



BUILDING GLOBAL COMMUNICATIONS

June 4, 2002

**VIA HAND DELIVERY**

The Honorable Michael K. Powell  
Chairman  
Federal Communications Commission  
445 12<sup>th</sup> Street, SW  
Washington, D.C. 20554

**Re: CC Docket No. 01-338, Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers; CC Docket No. 96-98, Implementation of the Local Competition Provisions of the Telecommunications Act of 1996; CC Docket No. 98-147, Deployment of Wireline Services Offering Advanced Telecommunications Capability**

Dear Chairman Powell:

On behalf of the Telecommunications Industry Association ("TIA"), I am writing to urge the Federal Communications Commission ("the Commission") to act expeditiously with respect to a key aspect of its pending triennial review proceeding on policies regarding unbundled network elements ("UNEs"). Specifically, TIA requests that the FCC promptly determine that incumbent local exchange carriers ("ILECs") are not required to provide unbundled access to new, last-mile broadband facilities.<sup>1</sup> While TIA recognizes that certain aspects of the agency's triennial review proceeding are complex and may take a substantial amount of time to resolve, we believe that it is both feasible and highly important for the FCC to rule on this limited issue within 90 days of the receipt of reply comments.

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<sup>1</sup> The term "new, last-mile broadband facilities" means any configuration of fiber, remote terminals, DSL and successor electronics, or any other similar wireline facilities that are used to provide high-speed Internet access or broadband services. See TIA Comments in CC Docket Nos. 01-338, 96-98, 98-147, at 16-17 (filed April 5, 2002) ("*TIA Comments*").

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**THE CURRENT REGULATORY FRAMEWORK IMPOSES  
SUBSTANTIAL BURDENS ON MAJOR ILECS, STIFLING A  
POTENTIALLY DYNAMIC SECTOR OF THE BROADBAND SERVICE  
INDUSTRY**

TIA, the principal industry voice for communications and information technology manufacturers and suppliers, strongly believes that implementing this change to the unbundling rules will have an immediate, positive, and lasting impact on investment in communications networks. As TIA explained in its comments in the triennial review proceeding, the current regulatory framework imposes substantial burdens on the ILECs, particularly the “major” ones, by requiring them to unbundle network elements used to offer competitive broadband services, even though they are not dominant players in the broadband market.<sup>2</sup> Forcing incumbents to provide broadband UNEs to competitors has undermined their incentives to invest in new technologies and facilities, thereby stifling a potentially dynamic sector of the broadband service industry.

Largely because ILECs have been prevented from recouping reasonable returns on investments, their spending on broadband and high-speed networks has dropped sharply. Indeed, ILECs significantly decreased their capital expenditures in 2001 and so far are doing the same in 2002.<sup>3</sup> The unbundling requirements also

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<sup>2</sup> TIA Comments at 14-18 (filed April 5, 2002). *See also* Next Level Communications Comments in CC Docket Nos. 01-338, 96-98, 98-147, at 3-7 (filed April 5, 2002) (explaining that smaller, independent ILECs that are not subject to such burdensome unbundling regulations have been far more successful at deploying integrated broadband service offerings than traditional ILECs) (“Next Level Comments”).

<sup>3</sup> *See, e.g.,* Mike Angell, *Telecom Hitting Bottom—Maybe*, Investor’s Business Daily, May 7, 2002 (citing announcements by RBOCs that capital spending in 2002 will be cut by 14 to 44 percent). For example, at least in part because of the uncertainty surrounding unbundling obligations, ILECs have hesitated to upgrade their networks to enable remote subscribers to have access to DSL services. For similar reasons, ILECs continue to lay copper even though forward-looking and bandwidth-rich fiber solutions can be deployed economically. *See, e.g.,* Comments of High Tech Broadband Coalition in

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place ILECs at a significant competitive disadvantage with other broadband carriers, such as cable, satellite, and fixed wireless operators—none of which are subject to similar regulatory burdens. Freeing ILECs from unbundling obligations with respect to new broadband access facilities accordingly holds the promise of making traditional wireline providers far stronger and more effective competitors in the broadband arena.

**EXPEDITIOUS ACTION IS NEEDED TO PROVIDE A CRITICAL BOOST TO THE BELEAGUED MANUFACTURING SECTOR AND PREVENT FURTHER JOB AND OPERATIONAL CUTBACKS**

An expeditious decision to not apply UNE obligations to ILEC broadband facilities likely will provide a much-needed jumpstart for the technology equipment manufacturing industry.<sup>4</sup> In the face of considerable expenditure reductions by the major wireline carriers, the telecom equipment sector has seen extensive financial losses and cutbacks in recent months.<sup>5</sup> Some of the major equipment vendors have cut as much as half of their work forces over the last year, and virtually none are

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(Continued . . .)

CC Docket Nos. 01-338, 96-98, 98-147, at 30-32 (filed April 5, 2002) (“HTBC Comments”). In contrast, ILEC spending on wireless networks—which are largely unregulated—has not suffered as extensively.

<sup>4</sup> For example, it has been estimated that expenditures on fiber-to-the-home systems could reach nearly \$45 billion in free market conditions versus just over \$5 billion in a more regulated environment. *See Assessing the Impact of Regulation on Deployment of Fiber to the Home, A Comparative Business Case Analysis*, Cambridge Strategic Management Group (5 April 2002), at 4, submitted as attachment to Comments of Corning, Inc. in CC Docket Nos. 01-338, 96-98, 98-147 (filed April 5, 2002) (“Corning Comments”).

<sup>5</sup> *See, e.g., No Break for Telecom Equipment Companies*, Communications Today, May 9, 2002; Sandra Swanson and John Rendleman, *Telecom Blues Pound Service Providers and Manufacturers*, Information Week, April 29, 2002.

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profitable.<sup>6</sup> Projections for the near future do not look much better. Given current marketplace conditions, industry analysts predict that equipment manufacturers will be forced to continue significant job and operational cutbacks over the next two years and that the industry will not see any kind of recovery until at least late 2003 or 2004.<sup>7</sup> Providing ILECs with increased incentives to invest in broadband facilities thus would offer the beleaguered manufacturing sector a critical boost.

**EXPEDITIOUS ACTION IS APPROPRIATE AS THE COMMISSION HAS REVIEWED THIS ISSUE IN A VARIETY OF PROCEEDINGS OVER THE LAST SEVERAL YEARS AND THE ISSUE HAS BEEN FULLY BRIEFED**

TIA and several other parties have fully briefed the Commission on the clear merits of exempting these facilities from unbundling obligations. In addition to the wide range of comments addressing this issue in the triennial review proceeding,<sup>8</sup> TIA has advocated the deregulation of ILEC broadband facilities before the Commission for several years. As early as the fall of 1999, TIA called on the agency to forbear from applying unbundling obligations when network providers install next-generation broadband loop facilities.<sup>9</sup> In the context of the Section 706

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<sup>6</sup> See Sudeep Reddy, *Start-up Telecom Manufacturers Switch Gears As Major Equipment Firms Cut Staff*, The Dallas Morning News, April 29, 2002; *No Break for Telecom Equipment Companies*, Communications Today, May 9, 2002 (noting that only one company in the sector is profitable). See Letter to the U.S. Senate from Matthew J. Flanigan (dated May 20, 2002) ("TIA member companies alone have laid off over 400,000 employees globally").

<sup>7</sup> See *Telecom Equipment Turnaround Not Expected Until 2003-2004*, Communications Daily, March 11, 2002.

<sup>8</sup> See, e.g., Next Level Comments; HTBC Comments; Comments of Alcatel USA, Inc. in CC Docket Nos. 01-338, 96-98, 98-147, at 10-11 (filed April 5, 2002); Comments of Catena Networks, Inc. in CC Docket Nos. 01-338, 96-98, 98-147, at 3-4 (filed April 5, 2002); Corning Comments at 3.

<sup>9</sup> Letter from Matthew J. Flanigan, President, Telecommunications Industry Association, to the Honorable William E. Kennard, Chairman, Federal Communications Commission, filed in CC Docket No. 96-98 (Aug. 2, 1999).

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proceedings, TIA similarly has argued that the FCC should address the regulatory barriers to new investment in high-speed Internet access technologies.<sup>10</sup> Because arguments on all sides of this matter have been presented to the Commission several times in the past two years, expeditious action on this limited request is both feasible and appropriate.<sup>11</sup>

**THE REQUESTED RELIEF IS CONSISTENT WITH THE 1996 ACT AND ITS CORE GOALS OF PROMOTING BROADBAND SERVICES AND FACILITIES-BASED COMPETITION**

The conclusion that unbundling obligations should not apply to ILECs' new last-mile broadband facilities is fully consistent with the 1996 Act, as interpreted by both the courts (including the Supreme Court) and the FCC. The Section 251 requirement that ILECs provide requesting carriers with nondiscriminatory access to UNEs clearly should not be imposed on new broadband facilities, because such facilities are not part of the ILECs' legacy networks and are used to provide competitive services.<sup>12</sup>

Pursuant to Section 251, the Commission must make a threshold finding that access to a proprietary network element is "necessary" and that failure to provide access to that element would "impair" an entrant's ability to provide competitive services before it may mandate unbundling (non-proprietary network elements are

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<sup>10</sup> Reply Comments of the Telecommunications Industry Association in CC Docket No. 98-146 (filed Oct. 9, 2001). *See also* Comments of the Telecommunications Industry Association, NTIA Docket No. 011109273-1273-01 (filed December 19, 2001).

<sup>11</sup> As AT&T noted in its comments in the triennial review proceeding with respect to fiber-fed loops, "[t]he issue of CLECs' right to access 'entire' or 'unified' loops as an unbundled network element has been before the Commission for at least two years and has been extensively briefed twice, with a full record awaiting decision for a year and a half." Comments of AT&T Corp. in CC Docket Nos. 01-338, 96-98, 98-147, at 163 (filed April 5, 2002).

<sup>12</sup> *See* 47 U.S.C. §251(c)(3).

subject to only the “impair” test).<sup>13</sup> The Supreme Court has determined that, in carrying out this obligation, the FCC must give substance to the terms “necessary” and “impair.”<sup>14</sup> The Court has further concluded that the statute places “clear limits” on unbundling, obligating the agency to evaluate the availability of elements outside of an ILEC’s network.<sup>15</sup> In its proceeding on remand from the Supreme Court, the Commission clarified that a proprietary element is “necessary” only if lack of access would “preclude the requesting carrier from providing the services it seeks to offer” and that “impair” means to “materially diminish” a requesting carrier’s ability to provide the services it seeks to offer.<sup>16</sup> Just recently, however, the U.S. Court of Appeals for the D.C. Circuit (“the D.C. Circuit”) ruled that the FCC has failed to justify its use of essentially an undifferentiated “impairment” standard and that, in the context of this standard, it has not adequately assessed all of the cost issues.<sup>17</sup>

This analytical framework, enlightened further by the new D.C. Circuit decision, dictates that new last-mile broadband facilities cannot be subject to unbundling requirements. As the Commission well knows, and as the D.C. Circuit reminded it in striking down the line-sharing obligation,<sup>18</sup> high-speed Internet

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<sup>13</sup> 47 U.S.C. §251(d)(2).

<sup>14</sup> *AT&T v. Iowa Utilities Board*, 525 U.S. 366, 387 (1999).

<sup>15</sup> *Id.* at 389, 397. In addition, the Court conclusively rejected the argument that *any* increase in cost or decrease in service quality alone could satisfy the statutory test. *Id.* at 392-93.

<sup>16</sup> *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, Third Report and Order and Fourth Further Notice of Proposed Rulemaking, 15 FCC Rcd 3696, 3705, 3725 (1999).

<sup>17</sup> *USTA v. FCC*, 2002 WL 1040574 (D.C. Cir.).

<sup>18</sup> *Id.*

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access and broadband services are being delivered to subscribers over a variety of competing technology platforms. Because of the widespread availability of elements outside of incumbent networks, competitors will not be “precluded” from offering broadband services without access to these facilities, nor will their unavailability “materially diminish” an entrant’s ability to provide competitive broadband offerings.

Most importantly, declining to mandate unbundling of these facilities will advance the Act’s core goals of promoting the rapid introduction of broadband and facilities-based competition. That much is evident because the current policy of mandating access to new broadband facilities has had the opposite effect. Consequently, in accordance with the Supreme Court’s directive to “adopt some limiting standard rationally related to the goals of the Act,”<sup>19</sup> the Commission should promptly discontinue the unbundling of new, last-mile broadband facilities.

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<sup>19</sup> *Iowa Utilities Board*, 525 U.S. at 388.


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Accordingly, in light of the clear policy and legal arguments favoring elimination of unbundling obligations for ILEC broadband facilities, TIA respectfully urges the FCC to determine within 90 days that unbundling obligations should not apply to ILECs' new, last-mile broadband facilities.

Respectfully submitted,

A handwritten signature in cursive script, reading "Matthew J. Flanigan".

Matthew J. Flanigan

President

Telecommunications Industry Association

cc:

The Honorable Kathleen Q. Abernathy

The Honorable Michael J. Copps

The Honorable Kevin J. Martin